Supreme Court, U.S.
F I L E D
APR 10 1996
CLERK

No. 95-1437

In the
Supreme Court of the United States
October Term, 1995

ALFREDO F. SMITH,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition For A Writ Of Certiorari To The North Carolina Supreme Court

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Robin P. Pendergraft*
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4723

**Counsel of Record*

QUESTION PRESENTED

I. WHETHER THE MANNER IN WHICH THE OFFICERS SEARCHED PETITIONER, BY REACHING INTO HIS PANTS TO RETRIEVE PACKETS OF COCAINE HIDDEN UNDER HIS SCROTUM, WHILE OFFICERS TOOK PRECAUTIONS TO SHIELD PETITIONER FROM VIEW OF POSSIBLE PASSERSBY, WAS REASONABLE UNDER THE FOURTH AMENDMENT?

This Page Intentionally Left Blank

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS THE WRIT SHOULD BE DENIED 7

I. THE ISSUE PRESENTED IN THIS CASE IS MERELY THE APPLICATION OF UNIQUE FACTS TO WELL-SETTLED CONSTITUTIONAL PRINCIPLES AND DOES NOT WARRANT REVIEW 7

CONCLUSION 17

This Page Intentionally Left Blank

TABLE OF AUTHORITIES

CASES

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) 10

Gray v. State, 600 So.2d 1076 (Ala. Ct. App. 1992) 15

Illinois v. Lafayette, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983) 16

Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) 16

State v. Smith, 118 N.C. App. 106, 454 S.E.2d 680 (1995) 10, 12

United States v. Alexander, 755 F. Supp. 448 (D.D.C. 1991), *aff'd*, 961 F.2d 964 *cert. denied*, 506 U.S. 858, 113 S. Ct. 170, 121 L. Ed. 2d 117 (1992) 12, 13

United States v. Ashley, 37 F.3d 678 (D.C. Cir. 1994) *cert. denied*, ____ U.S. ____, 115 S. Ct. 1171, 130 L. Ed. 2d 1124 (1995). 15

United States v. Bazy, 1994 WL 539300 (D. Kan. 1994) 12, 13

United States v. Montoya de Hernandez, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) . . . 10

This Page Intentionally Left Blank

No. 95-1437

In the
Supreme Court of the United States
October Term, 1995

Alfredo F. Smith,
Petitioner,

v.

State of North Carolina,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of North Carolina

BRIEF IN OPPOSITION

The respondent, State of North Carolina [hereinafter "State"], by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina, and Robin P. Pendergraft, Special Deputy Attorney General, requests the Court to deny the Petition for Certiorari filed by the petitioner, Alfredo F. Smith [hereinafter "Smith"], seeking review of the *per curiam* decision of the Supreme Court of North Carolina.

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Satisfied with Smith's statements of the opinions below, jurisdiction, and constitutional amendments and statements involved, the State omits these items pursuant to Supreme Court Rules 15.2 and 24.2.

STATEMENT OF THE CASE

A. Procedural History

Except as set out below, the State is satisfied with Smith's statement of the proceedings in the courts below. On 10 February 1993, petitioner filed a pre-trial motion with a supporting affidavit to suppress evidence found on his person alleging the search of petitioner and seizure of contraband was illegal pursuant to the Fourth Amendment. Prior to trial, a suppression hearing was conducted by the trial court. After hearing testimony from Deputy James E. Cook and petitioner, the trial court entered an order denying Smith's motion to suppress.

B. Statement of Facts

Prior to petitioner's arrest on 12 May 1992, Deputy James E. Cook had received "numerous pieces of information from sources in the area that we [he and other officers with the sheriff's department] had used before, that Alfredo Smith was operating a drug house and was selling drugs in the Bonnie Doone area." These confidential sources in-

formed law enforcement officials that Smith maintained houses for the purpose of having drugs sold for him by getting people in those houses to work for him, delivering drugs to these people, and receiving the profits from the drugs they sold for him. During the two to three years preceding 12 May 1992, Deputy Cook had stopped Smith before and was otherwise familiar with him. Based upon Deputy Cook's training and experience, he testified during the motion hearing that illegal drugs were sold in many different ways in the Bonnie Doone area, to include sales by persons standing on the street corners and working from inside residences.[1]

At approximately 12:15 a.m. on 12 May 1992, Deputy Cook received a telephone call from a confidential source of information that he had used previously in other drug related cases and found to be reliable. The source informed him that Smith was driving that night to an unknown location with about two thousand dollars in his possession to purchase cocaine. Petitioner would be driving a red Ford Escort bearing the license plate number EVN 7322 and would return with the cocaine to a red brick duplex apartment located on a small dirt road off of Johnson Street. The informant described the apartment as the last apartment

---

[1] At the time of Smith's arrest in May 1992, Deputy Cook had been employed as a deputy sheriff with the Cumberland County Sheriff's Department for approximately four years. During those four years, he had been assigned to the Department's Special Operations Unit which is a "street crimes unit targeting street level narcotics." For two or three years preceding May 1992, Deputy Cook had been working in the Bonnie Doone area of Fayetteville, which is a large housing area known to have a drug problem.

on the left at the end of the dirt road, which he believed was 617-D Johnson Street. The informant explained that once Smith returned to the apartment he would cut up the cocaine, package it in aluminum foil, quickly depart and drive to a house on Buffalo Street, off of Bragg Boulevard, to deliver the cocaine for subsequent selling. The source added that Smith would transport the packaged for sale cocaine concealed on his person, under his crotch.

Immediately thereafter, Deputy Cook contacted his supervisor and his partner in the Cumberland County Sheriff's Department, Rick O'Briant, and asked O'Briant to meet him at a specified location. Together they picked up the informant who guided them to the apartment off of Johnson Street. As the three drove a short distance down the dirt road, the informant pointed to a small red Ford Escort parked in front of the last apartment on the left and stated "that's the vehicle." He also showed the officers the apartment where Smith was preparing the cocaine. The officers backed out of the roadway to avoid detection and subsequently released the informant. The time was approximately 1:15 a.m.

Before the informant was released, he informed the officers that Smith would be staying for only a short period of time at the apartment. He explained that the house on Buffalo Street had sold out its supply of cocaine and petitioner was trying to deliver more cocaine to his sellers.

The officers thereafter positioned their two vehicles so that they could observe Smith leave the apartment. At approximately 1:30 a.m., the red Ford Escort drove onto Johnson Street from the dirt road heading toward Bragg Boulevard. Deputy O'Briant began to follow the red car,

informed Deputy Cook of the car's direction, and confirmed that a black male was operating the vehicle bearing the license plate number of EVN 7322. After the officers activated their blue lights, the red vehicle stopped in the left turn lane on Johnson Street just prior to Bragg Boulevard, with Deputy Cook's vehicle in front of Smith's car and Deputy O'Briant's patrol vehicle behind Smith. They approached the stopped car and recognized the driver as petitioner. After the officers identified themselves, Deputy Cook informed Smith they had information that he was transporting cocaine in his vehicle and on his person and they intended to search him and his vehicle.

Initially Deputy Cook conducted a weapons search of Smith and his car using his flashlight and hands. Once no weapons were discovered, Deputy Cook told Smith he believed Smith had cocaine concealed inside his underwear and he wanted to look for the drugs there. Deputy Cook asked petitioner to stand behind the Ford Escort's open car door with his back to the door. The deputy then stood next to Smith who was, at that point, facing him in order to provide some privacy. Deputy Cook testified that he "stepped in between [Smith] and the doorway because [he] didn't want to expose [Smith] to other cars, the public, to embarrass him, that sort of thing."

At Deputy Cook's request, Smith opened his cut-off blue jean shorts and held open his underwear. Using a flashlight the officer peered down into Smith's underwear, both front and rear. Deputy Cook could see nothing and realized that petitioner, using both hands, was holding his underwear very tightly against his crotch such that it was impossible to see underneath petitioner's scrotum. When the deputy asked Smith to pull his underwear down a little

farther so that the deputy could see better, he refused to comply. Finally, Deputy Cook slid petitioner's underwear down himself, whereupon using his flashlight he saw the corner of a small paper towel underneath petitioner's scrotum. Thereafter, when Deputy Cook pulled the underwear down farther in an attempt to retrieve the paper towels, petitioner "resisted a little bit."

Deputy Cook removed the paper towel from underneath Smith's scrotum and discovered sixteen small foil-wrapped packets inside the towel. Inside each packet was a brownish rock-like substance which the officer believed to be crack cocaine. A field test of the substance indicated it was cocaine. Deputy Cook arrested and charged Smith with various violations of North Carolina's controlled substances act.

Smith testified that he was stopped by Deputies Cook and O'Briant on Johnson Street in the early morning hours of 12 May 1992. He indicated that he agreed to let the officers search his car because they threatened him. After searching Smith's car, Deputy Cook asked Smith to pull his underwear down. Smith pulled out his shorts and underwear and allowed Cook to look in using a flashlight. When Deputy Cook requested Smith to turn around, Smith refused stating "[y]ou are not searching me in my rear, in my butt, in the middle of the street . . .." Deputy Cook grabbed petitioner's shorts and underwear and pulled it down and searched by shining his flashlight. Petitioner testified that Deputy Cook conducted a second search of his car, then informed petitioner he was going to search him again. The officers grabbed petitioner's hands and searched him again, which resulted in the finding of the cocaine.

REASONS FOR DENYING THE WRIT

I. THE ISSUE PRESENTED IN THIS CASE IS MERELY THE APPLICATION OF UNIQUE FACTS TO WELL-SETTLED CONSTITUTIONAL PRINCIPLES AND DOES NOT WARRANT REVIEW.

Petitioner requests that this Court issue its Writ of Certiorari to consider whether the manner in which law enforcement officers searched him was reasonable within the meaning of the Fourth Amendment. In his Petition, Smith characterizes this search as a "strip search", indicating that he was forced "to disrobe." Neither court below characterized this search in this manner.

It is the State's position that the Supreme Court of North Carolina correctly held the search of petitioner to be reasonable under the factual circumstances and in accordance with the law. The State disputes petitioner's characterization of the search. We contend that the facts in this case fail to sustain any alleged violation of petitioner's constitutional rights. This case's factual uniqueness should preclude review by this Court.

The trial court found the search did not violate the Fourth Amendment, based upon its evaluation of the witnesses and their versions of what transpired on Johnson Street, in addition to Smith's failure to clearly and specifically object at trial that the manner of the search was intolerable. Smith's motion to suppress and his supporting affidavit focused primarily on the existence of probable cause to search his person and apartment. (Rpp. 5-9). During the suppression hearing, defense counsel never while cross-examining Deputy Cook asked about the manner in which he

searched petitioner. Defense questions concentrated on the informant and the search of the apartment. (Tpp. 24-29, 30-31). More importantly, however, is the light cast upon this picture by Smith's own testimony. According to petitioner:

> He [Deputy Cook] asked me to -- he's patting me down. And then he asked me to pull my underwear -- my clothing down. I did not have on jeans. I had a short set. I had jockey strap underwear.
>
> So, I pull out my under -- I pull out my short set, along with the underwear, and show him my testicles. He had his flashlight in his hand. He instructed me to move it to the left, move it to the right. Meanwhile he was shining down there. Okay?
>
> So then he said, well, I want you to turn around. I said hell no. You are not searching me in my rear, in my butt, in the middle of the street. Here we go. We standing [sic] in the middle of the intersection of Bragg Boulevard and Johnson Street. He wants to search my rear.
>
> So, I tried to refuse, but I couldn't fight it off. He grabbed a'hold of my short set and my underwear, pulled it down, and shined his flashlight in my butt. **No problem**.
>
> He instructed me to go back and stand right next to Officer O'Briant. He conducted a second search of the car. Went through the car again, right? When he got through, he came back to me again. He said I wants [sic] to search you again. I wants [sic] to see your

> underwear again. I said no. You've already search me. You don't need to search me again.
>
> So he instructed me to pull my underwear the same way that I did. When I refused to -- I did agree to pull it out like this. When I did like this again, he wanted to stick his hand down there. And I say what are you doing. By the time I say that, they both grab a'hold of my hand. And Officer O'Briant had my left hand and Officer Cook had my right hand, and they kind of lean [sic] me backwards, like this.
>
> Officer Cook then **proceeded to shine the light down there, switched the flashlight he had and went down in my underwears [sic] while I'm being held. And he come [sic] up with the tissue paper,** okay?

(Tpp. 34-35) (emphasis added). One could reason that while Smith did not want to be discovered with drugs hidden on his person, he basically had "no problem" with the officer's search of him with the flashlight on his backside. According to Smith, the last search in which the officers had to physically restrain him consisted of Deputy Cook **reaching down in petitioner's underwear** and retrieving the tissue paper. Based upon Smith's own testimony, it would seem that his shorts were only open and not pulled down to any significant degree. The above reasons, combined with Deputy Cook's described efforts to shield Smith during the search, support a finding that the scope of the search was reasonable.

There is no dispute that the Fourth Amendment establishes the right to be free from unreasonable searches

and seizures. The question of whether a particular search or seizure is reasonable depends upon all the surrounding facts and circumstances, including the nature of the search or seizure. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S. Ct. 3304, 87 L. Ed. 2d 381, 388 (1985).

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447, 481 (1979). Based upon the limited scope and manner of the intrusion and the justification for the search, the North Carolina Supreme Court correctly concluded that the motion to suppress was properly denied.

The North Carolina Court of Appeals, in its majority opinion, characterized the search of Smith as one "akin to a strip search" which was not limited in scope nor required by unusual circumstances. *State v. Smith*, 118 N.C. App. 106, 116, 454 S.E.2d 680, 686 (1995). The search here did not rise to the level of a strip search since petitioner was not required to completely disrobe or remove from his person any clothing. Deputy Cook described the search in the following manner:

> I used my flashlight, and he opened his trousers and I looked down into his underwear, to

the front of his underwear. And he held his -- as he was holding his trousers open, he held the underwear with both hands, was holding very tightly against his crotch to where I couldn't see underneath his scrotum or testicles.

I looked behind him towards his rear and to the front I couldn't see him. I asked him to pull it down farther. He resisted to pulling it down. Finally I walked to the front of him and held his underwear myself and slid it down. As which point with my flashlight I could see the corner of a small paper towel underneath his scrotum. I then pulled his underwear farther. He resisted a little bit. I pushed him back into the door and reached into, uh -- underneath his scrotum and removed the paper towel.

. . .

Q. When you described his resisting -- you said he resisted you, I believe, during the time that you were trying to examine his underwear. Can you describe what resisting he did?

A. Well, I kept asking him to pull his underwear down farther to where I could see. He would pull them out where you could see in front, but he would not pull them down where I could see underneath his scrotum.

Q. Did you instruct him to pull them down?

A. Yes.

Q. And he did not?

A. No.

(Tpp. 22-24). "Searches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *United States v. Bazy*, 1994 WL 539300 at p. 8 (D. Kan. 1994).

In reaching their conclusions the North Carolina courts analyzed the facts here in light of recent federal court cases, *United States v. Bazy*, 1994 W.L. 539300 and *United States v. Alexander*, 755 F. Supp. 448 (D.D.C. 1991), *aff'd*, 961 F.2d 964, *cert. denied*, 506 U.S. 858, 113 S. Ct. 170, 121 L. Ed. 2d 117 (1992). Citing *Bazy*, the North Carolina Court of Appeals majority opined that "in balancing the scope of the search against exigent circumstances in determining reasonableness, courts have allowed highly intrusive warrantless searches of individuals where exigent circumstances are shown to exist, such as imminent loss of evidence or potential health risk to the individual." *Smith*, 118 N.C. App at 115, 454 S.E.2d at 686. The North Carolina Supreme Court agreed with the North Carolina Court of Appeals dissent's assessment that the facts and holding of *Bazy* suggest that Deputy Cook's search of Smith was justified under the circumstances.

In *Bazy*, a trooper with the Kansas Highway Patrol stopped Bazy and his companion on the Kansas Turnpike at about 8:30 a.m. for a possible traffic violation. Following the stop, both men and the car were searched by troopers, whereupon the "troopers unbuckled Bazy's pants and pulled

them away from this waist and checked his underwear for drugs." *Bazy* at p. 3. Upon viewing a substance wrapped in plastic lodged between Bazy's buttocks, the trooper reached into Bazy's pants and removed the plastic bag. The search occurred on a "grassy edge of the roadway between the defendant's car and a patrol car." *Id.* Any view of Bazy by oncoming traffic was obstructed by the patrol car and a trooper standing in front of him. Based upon those facts, the court in *Bazy* found the search to be limited in scope and intensity such that it did not violate the Fourth Amendment. *Id.* at p. 7.

The court in *Alexander* similarly found that a search conducted by a Washington, D.C. Metropolitan Police detective did not violate that defendant's Fourth Amendment rights. There, defendant Alexander disembarked from a bus at the Greyhound Bus station in Washington D.C. at about 6:30 p.m. on 4 October 1990, and left the station on foot. About a block and a half away, the detective stopped Alexander, questioned him and searched him while on the sidewalk of First Street. The detective subsequently reached inside the front of Alexander's underwear and removed a bag containing cocaine. That court cited as exigent circumstances the possibility that a delay in searching Alexander could have enabled him to dispose of the concealed drugs. 755 F. Supp. at 455.

Based upon the above cases and the relevant factors for determining reasonableness, the State produced sufficient evidence to show that the manner in which Deputies Cook and O'Briant conducted their search of petitioner was reasonable. Here, the officers stopped Smith's vehicle in the left turn lane on Johnson Street just prior to Bragg Boulevard, positioning a police vehicle in front of and behind

Smith's car. Considering the time of morning, 1:30 a.m., and the testimony from both Deputy Cook and petitioner regarding the extensive use of flashlights by the officers, one could easily surmise that the visual acuity at that time was greatly impaired by the lack of light, such that darkness prevailed. Moreover, prior to the search, Deputy Cook asked petitioner to step behind the open car door of petitioner's vehicle and positioned himself between petitioner and the car door. Deputy Cook specifically explained that he took those precautions "because [he] didn't want to expose [Smith] to other cars, the public, to embarrass him, that sort of thing." As pointed out in the North Carolina Court of Appeal's dissenting opinion, petitioner did not dispute Deputy Cook's testimony regarding these precautions. His main objection was that he did not want the deputy to "search [his] rear" in "the middle of the street." Clearly, the officers took steps to protect Smith's privacy interests.

Additionally, the State's evidence showed that during the search Smith held his underwear with both hands and was holding it very tightly against his crotch. Deputy Cook pulled petitioner's underwear down to a point where he could see the corner of a small paper towel underneath petitioner's scrotum. Neither witness clearly indicated the exact position of Smith's pants on his body after the deputy pulled on them. A reasonable person could conclude, however, that had petitioner's underwear been pulled down below his genitalia, the deputy would have seen more than just a "corner" of the paper towel. He would have had a clear view of the paper towel holding sixteen small foil-wrapped packets of crack cocaine. Even Smith testified that at the time Deputy Cook retrieved the paper towel he "went down in [petitioner's] underwears [sic]", which would indicate that petitioner's

clothing still covered his lower body and private areas since the deputy had to reach down into petitioner's pants. Contrary to petitioner's repeated assertions, the facts simply do not support petitioner's allegation that the government forced him to disrobe in public and bare his genitals to all passersby.

Upon considering the totality of the circumstances in the instant case, Judge Walker concluded in his dissent to the North Carolina Court of Appeals majority opinion that the officers, "like the trooper in *Bazy*", took the necessary and reasonable precautions to prevent the public exposure of Smith's private areas. The North Carolina Supreme Court agreed that the manner in which the officers conducted the search was entirely reasonable. *See also United States v. Ashley*, 37 F.3d 678 (D.C. Cir. 1994) *cert. denied*, ____ U.S. ____, 115 S. Ct. 1171, 130 L. Ed. 2d 1124 (1995). (Search and seizure of drugs from inside bus passenger's underwear while standing at the side of the bus station did not constitute an invasion of privacy since precautions were taken to ensure that defendant was not subjected to public embarrassment.)

Furthermore, exigent circumstances did in fact exist in this case. A delay of the search until the officers could transport petitioner to their department would have greatly increased the possibility that petitioner could dispose of the drugs. Law enforcement officer's are well aware that items such as contraband often find their way into the creases of a patrol car's back seat or the car's floor board. *See Gray v. State*, 600 So.2d 1076 (Ala. Ct. App. 1992). (Defendant convicted of unlawful possession of marijuana found in back area of the patrol car only because the officer was able to testify that he had inventoried his patrol car prior to the

arrest and no one else sat in the back seat during the rest of his shift prior to the discovery of the bag.)

Finally, petitioner acknowledges this Court's opinion in *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S. Ct. 2605, 77 L. Ed. 2d 65, 72 (1983) that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means". Yet, petitioner proposes examples of other "less intrusive" means the officer could have "easily employed." We have already discussed the problems associated with the suggestion that the officers search petitioner after transporting him to their department. Furthermore, it would be most difficult, if not impossible to search the crotch of a person's underwear while he is sitting within the confines of a patrol car. The difficulty would continue to exist should the subject be required to lie down in the car. More importantly, however, an attempt to search a subject in the back or front seat of a car would unnecessarily expose an officer to danger from a resisting subject. Finally, law enforcement officers in North Carolina are trained to thoroughly search subjects prior to placing them in the officers' patrol vehicles, in order to protect the officers and preserve the evidence. *See Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (concern for safety of officer provides adequate justification for officer requesting driver to step out of his vehicle).

Based upon the circumstances of this particular case, the North Carolina Supreme Court joined the lower court's dissenting opinion in declaring an unwillingness to "second-guess" the trial court's finding that the officers' conduct during the search of Smith did not violate his Fourth Amendment rights. The trial court was in a "superior position to

evaluate the reasonableness of the search". The North Carolina Supreme Court correctly held that the search of Smith was not intolerable in its intensity and scope.

CONCLUSION

The issue contained herein is the application of specific facts, albeit apparently controverted, to well settled constitutional principles, and such, does not warrant review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL F. EASLEY
Attorney General

*Robin P. Pendergraft
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-4723

*COUNSEL OF RECORD

April 10, 1996